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By email

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Dear Mr Edwards

Howard League for Penal Reform's response to the CPS consultation on legal guidance on secondary liability

Thank you for the opportunity to respond to the CPS consultation on legal guidelines on secondary liability.

This response deals with the Howard League's views that:

- The guidance ought to require a distinct approach for children under the age of 18 that takes account of their stage of cognitive development in considering their foresight;
- The guidance ought to explicitly factor in recent developments about the on-going maturation and development of young adults between the ages of 18 – 25
- The guidance ought to highlight the need for prosecutors to be alive to issues concerning the disproportionate representation of BAME people in the criminal justice system following the findings of the Lammy review.

About the Howard League for Penal Reform

Founded in 1866, the Howard League is the oldest penal reform charity in the world. We have some 13,000 members, including lawyers, politicians, business leaders, practitioners, prisoners and their families and top academics. The Howard League has consultative status with both the United Nations and the Council of Europe. It is an independent charity and accepts no grant funding from the UK government.

The Howard League works for less crime, safer communities and fewer people in prison. We aim to achieve these objectives through conducting and commissioning research and investigations aimed at revealing underlying problems and discovering new solutions to issues of public concern. The Howard League's objectives and principles underlie and inform the charity's work.

Since 2002 the Howard League has provided the only legal service dedicated to representing children and young people in custody under the age of 21. We have drawn

upon our lawyers' experience in practice, our direct work with children and young adults, and our expertise in this policy area in this response.

The need to fully factor in age and maturity in the guidance

The guidance refers briefly to age and maturity to the extent that it reiterates the relevant part of the public interest aspect of the Code for Crown Prosecutors that provides:

“The suspect's age or maturity: significant weight must be attached to the age of the suspect if they are a child or young person under 18. The best interests and welfare of the child or young person must be considered including whether a prosecution is likely to have an adverse impact on his or her future prospects that is disproportionate to the seriousness or persistence of the offending. Prosecutors must have regard to the principal aim of the youth justice system which is to prevent offending by children and young people. As a starting point, the younger the suspect, the less likely it is that a prosecution is required.”

The guidance also advises prosecutors to take particular care in reaching a decision to prosecute “youth offenders”.

However, given the critical importance of the question of foresight in cases concerning secondary liability, it would be wholly appropriate to refer prosecutors to the growing evidence as to the extent to which children and young adults under the age of 25 are still developing and maturing.

Children

It is well established that children should be treated differently from adults. This applies to the criminal justice system as a whole. In *R v G* [2003] UKHL 50, [2004] 1 AC 1034 Lord Steyn stated that: “Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society.”

The immaturity of the child in conflict with the law has been recognised by the courts as a key factor in all decisions affecting children. For example, in *R (F and Thompson) v Secretary of State for the Home Department* [2008] EWHC 3170 it was held that:

“[t]he courts have consistently approached consideration of measures which are to be applied to children on the basis that the immaturity of a child offender must be taken into consideration as being of prime importance. This recognises the fact that a child may well change as he or she matures so that any problems or dangers which may have been apparent at the time of the commission of the offence may ultimately no longer be present...” (paragraph 19).

A critical aspect of maturation is the development of understanding the consequences of actions. This is recognised in the Sentencing Council guidance on Overarching Principles for Children and Young People (2017) which states:

“... the developmental and emotional age of the child or young person should always be considered and it is of at least equal importance as their chronological age. It is important to consider whether the child or young person has the necessary maturity to appreciate fully the consequences of their conduct, the extent to which the child or young person has been acting on an impulsive basis and whether their conduct has been affected by inexperience, emotional volatility or negative influences.” (paragraph 4.10)

It follows that if a child may not be expected to understand the consequences of their own actions, their ability to understand the intentions and consequences of another's actions may be even more difficult for a child to foresee. A different approach is required to this specific issue and it is not sufficient to simply nod to the existing guidance in the Code.

Young adults (18 – 25)

In its concluding report on Young Adults in the criminal justice system published in 2016, the Justice Committee strongly advocated a distinct approach for young adults:

“In our view there is a strong case for a distinct approach to the treatment of young adults in the criminal justice system. Young adults are still developing neurologically up to the age of 25 and have a high prevalence of atypical brain development. These both impact on criminal behaviour and have implications for the appropriate treatment of young adults by the criminal justice system as they are more challenging to manage, harder to engage, and tend to have poorer outcomes. For young adults with neuro-disabilities maturity may be significantly hindered or delayed. Dealing effectively with young adults while the brain is still developing is crucial for them in making successful transitions to a crime-free adulthood.” (page 13)

The government responded in January 2017 to the Justice Select Committee Inquiry on young adults. The government argued that developmental status does not need to be recognised in legislation because of the increasing role maturity plays in policy and practice (p.7). However, to make this true, it is imperative that guidance such as this explicitly factors in the evidence about young adults as a distinct and cognitively maturing group.

BAME issues

The interim guidance is silent on BAME issues. It is appropriate for this guidance to at least raise the risk of bias in prosecutorial decision-making. There is precedent for this from other statutory bodies: the recent Sentencing Council publication, *Sentencing Children and Young People*, explicitly raises the issue of the disproportionate representation of BAME children in the criminal justice system.

The issue is highly relevant to this particular guidance. A report by Williams and Clarke, *Dangerous associations: Joint enterprise, gangs and racism*, published in January 2016 by the Centre for Crime and Justice Studies found that:

- Prosecutors regularly rely on racial stereotypes in relation to black defendants, using a range of signifiers to direct juries to increase the likelihood of conviction of secondary parties.
- ‘Gangs’ discourse was significantly more likely to be cited in the prosecution of BAME joint-enterprise defendants than white defendants.
- The gang label is disproportionately attributed to BAME people, when compared to both the size of the BAME populations within each of the cities in the study

The Lammy review, published in September 2017, recommended that “the CPS should take the opportunity, while it reworks its guidance on Joint Enterprise, to consider its approach to gang prosecutions in general.”

However, the timing and scope of this consultation has not provided a full opportunity for this. The consultation should be extended with a view to seeking views on this specific issue.

Conclusion

The notion of clear guidance to bring prosecutorial decision making into line with the Supreme Court's ruling is welcome. However, if injustice is to be avoided, the special position of children and young adults must be explicitly factored into this guidance. Further, this guidance should include explicit reference to the need for prosecutors to address the risk of racial bias in light of the Lammy review and the evidence referred to in this submission about the particular risk of over-representation of BAME people in secondary liability cases.

I would be happy to meet with you to discuss this further should that be of assistance.

Yours sincerely,



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Legal Director